IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

GOVERNMENT'S RESPONSE TO STANDBY COUNSEL'S MOTION TO STRIKE "NOTICE OF SPECIAL FINDINGS" FROM SUPERSEDING INDICTMENT

The United States respectfully opposes Standby Counsel's Motion to Strike "Notice of Special Findings" from Superseding Indictment (hereafter "Motion to Strike").

Apparently hedging against the failure of their constitutional attack upon the Federal Death Penalty Act (FDPA) grounded in a misreading of the Supreme Court's recent decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), standby counsel have reversed course and now seek to strike the "Notice of Special Findings" from the second superseding indictment as surplusage. Earlier, in their pleading styled "Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death" (Docket No. 303), standby counsel wrote: "aggravating factors are the 'functional equivalent of elements of the offense.' Consequently those factors must be present to the grand jury and included in the indictment." Memorandum at 3.[1] Now, standby counsel abandon that position and argue the opposite: that the

[1]Similar statements appear in other parts of the same memorandum: "after Ring, aggravating factors in a federal capital prosecution must be approved by the grand jury and included in the indictment" (Memorandum at 5) and "Congress certainly knew that, if they were elements of the offense, the aggravating factors would have to be passed upon by the grand jury and included in the indictment." (Memorandum at 8).

indictment improperly includes a finding by the grand jury as to the aggravating factors. Indeed, standby counsel have gone to the other extreme by stating that "[b]ecause the Second Superseding Indictment includes a Notice of Special Findings which contains matters not germane to the establishment of any offense created by Congress, that Notice should be stricken as surplusage." Motion to Strike at 4. This claim must also fail.

Rule 7(d) of the Federal Rules of Criminal Procedure provides that "[t]he court on motion of the defendant may strike surplusage from the indictment . . . ." "The purpose of Rule 7(d) is to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges made in an indictment, or not essential to the charge, or unnecessary, or inflammatory." United States v. Poore, 594 F.2d 39, 41 (4th Cir. 1979) (internal citations omitted); see also Fed. R. Crim. P. 7(d) Advisory Note (this provision "introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial."). Thus, standby counsel must demonstrate prejudice to the defendant by the inclusion of the "Notice of Special Findings" in the indictment. See United States v. Hartsell, 127 F.3d 343, 354 (4th Cir. 1997) (finding no prejudice by inclusion of unnecessary language in indictment). Moreover, "[w]ords descriptive of what is legally essential to the charge in the indictment cannot be stricken as surplusage." United States v. Behenna, 552 F.2d 573, 576 n. 5 (4th Cir. 1977) (quoting 1 C. Wright, Federal Practice and Procedure § 127 at 278 (3d Ed. 1969)).

As set forth in the Government's Opposition to Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Government's Notice of Intent to Seek a Sentence of Death, the Supreme Court is likely to find that the Indictment Clause of the Fifth

Amendment mandates submission of aggravating factors to the grand jury in light of the Court's rulings in Ring, Harris v. United States, 122 S. Ct. 2406 (2002), and Jones v. United States, 526 U.S. 227 (1999). Indeed, as stated above, this was the position of standby counsel in their earlier pleadings. The "Notice of Special Findings" passed upon by the grand jury and included in the Second Superseding Indictment ensures compliance with the Indictment Clause. See United States v. Fell, __ F. Supp.2d __, 2002 WL 31113946 at *11 (D. Vt. September 24, 2002) ("The superseding indictment in this case [which included the aggravating factors] satisfies the requirements of the Indictment Clause."); United States v. Regan, __ F. Supp.2d __, 2002 WL 31101768 at *7 (E.D. Va. September 18, 2002) ("statutory aggravating factors of § 3592(b) . . . are the functional equivalent of elements and must appear in the indictment); United States v. Lentz, __ F. Supp.2d __, 2002 WL 2002594 at *8 (E.D. Va. August 22, 2002) ("the *mens rea* requirements of § 3591(a)(2) and the statutory aggravating factors of § 3592(c) . . . are the functional equivalent of elements and must appear in the indictment). Indeed, the court in Fell, upon which standby counsel's motion rests, stated the following:

> Although the FDPA does not expressly provide for grand jury indictment on the eligibility factors, "nothing in the statute is inconsistent with such a role for the grand jury." United States v. Church, __ F. Supp.2d __, __, 2002 WL 31004680 at *1 (W.D. Va. 2002); see also United States v. O'Driscoll, No. 4:CR-10-277, slip op. at 5 (M.D. Pa. Aug. 22, 2002). That the FDPA is silent concerning the grand jury's role in charging death-eligibility factors does not suggest that Congress intended to forbid grand jury participation or to exclude these factors from an indictment. On the contrary, Congress has provided for the grand jury's involvement in charging federal capital offenses in Rule 7 of the Federal Rules of Criminal Procedure: "An offense which may be punished by death shall be prosecuted by indictment . . . The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(a), (c). In line with the holdings of Jones, Apprendi and Ring, the essential facts of a capital offense must include the mental culpability and statutory aggravating factors specified in the FDPA. That the FDPA prescribes that a defendant receive notice of these factors does not preclude a grand jury's deliberating and voting to

> indict on these factors. United States v. Lentz, __ F. Supp.2d __, ___, 2002 WL 2002594 at *7 (E.D. Va. 2002).

United States v. Fell, 2002 WL 31113946 at *11.

Standby counsel continue to misunderstand the import of Ring and Jones by saying that the aggravating factors are either elements of a "greater [death eligible] offense" or a sentencing factor and, only if they are elements, may they be alleged in the indictment. By advancing this argument again, standby counsel fail to comprehend that the rulings in Ring and Jones speak to substance, not form. Because aggravating factors enhance a defendant's prospective sentence, they must comply with constitutional mandates such as those set forth in the Fifth Amendment. Ring v. Arizona, 122 S. Ct. at 2439 ("The dispositive question . . . 'is one not of form, but of effect.'"). "Regardless of whether the statutory factors have been labeled, considered or construed as elements or sentencing factors, they must be treated as elements under the authority of Jones, Apprendi and Ring." United States v. Fell, 2002 WL 31113946 at *10. The point is simply that the Supreme Court is likely to rule that aggravating factors must reviewed by the grand jury and included in the indictment for a defendant to be eligible for the death penalty. For this very reason, Judge Lee recently wrote:

> Similarly, the form chosen by the Government in presenting these facts in the superseding indictment – the "Notice of Special Findings" – is permissible. Neither the Fifth Amendment nor Fed. R. Crim. P. 7 prohibits the presentation of such information in this manner. Although a defendant may strike surplusage from an indictment, see Fed. R. Crim. P. 7(d), the holdings of Jones, Apprendi, and Ring establish that the statutory aggravating factors are neither immaterial nor irrelevant to Defendant's punishment. See, e.g., United States v. Poore, 594 F.2d 39, 41 (4th Cir. 1979) ("The purpose of Rule 7(d) is to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges made in an indictment . . ."). Thus, this contention is not well taken.

United States v. Regan, __ F. Supp.2d __, 2002 WL 31101768 at *7; see also United States v.

Lentz, __ F. Supp.2d __, 2002 WL 2002594 at *8. Thus, the Second Superseding Indictment properly alleges the aggravating factors in the "Notice of Special Findings."

Finally, "[n]o statute or rule of procedure restricts the ability of a grand jury to make the findings that it did in this case. It would be unwarranted to hold that the death penalty statute by implication circumscribed the authority of the grand jury to determine that the defendant was eligible for the death penalty by virtue of the circumstances of his case." United States v. Church, __ F. Supp.2d __, 2002 WL 31004680 at *2 (W.D. Va. September 5, 2002). Moreover, standby counsel can point to no prejudice to the defendant by the inclusion of the "Notice of Special Findings" in the Second Superseding Indictment. This is particularly true since standby counsel has repeatedly advocated that Congress should change the FDPA to require inclusion of the aggravating factors in the indictment. See, e.g., Memorandum at 3 ("Congress must determine whether, in light of Ring, such factors must be submitted to the grand jury . . . ."). During the guilt phase, the jury will not even be aware of the "Notice of Special Findings," because they will not be submitted for jury review until the penalty phase. Thus, no possible prejudice to defendant exists. Therefore, standby counsel's motion must fail.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on October 17, 2002, a copy of the foregoing Government's Response provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following:

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